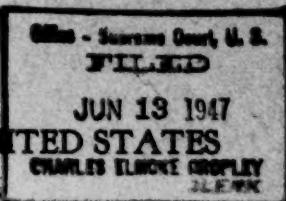


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947



No. [redacted]

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In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee;

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee designated as the "Robert Butler Trust".

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust Dated June 18, 1920, with Builders Trust Company as Trustee designated as the "Effie Butler O'Connor Trust".

Builders Trust Company,

*Petitioner,*

vs.

Walter P. Butler, Helen W. Butler, Effie Butler O'Connor, William Vernon O'Connor, Rosemary O'Connor Doll, Walter Butler O'Connor and Richard O'Connor; Builders Trust Company and James R. Faricy, Co-Trustees of Trust created under Indenture of Trust on June 18, 1920, by Walter Butler for the benefit of Walter P. Butler, Robert Butler, Walter Butler III, Mary Butler and Catherine Butler,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION.

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BUILDERS TRUST COMPANY, a Minnesota corporation,  
*Petitioner.*

LOUIS P. SHEAHAN,  
SAMUEL LIPSCHULTZ,  
*Petitioner's Attorneys*  
1300 Minnesota Building,  
St. Paul 1, Minnesota.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. ....

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In the Matter of the Trust Created by Walter Butler under  
Written Indenture of Trust Dated June 18, 1920, with  
Builders Trust Company as Trustee;

In the Matter of the Trust Created by Walter Butler under  
Written Indenture of Trust Dated June 18, 1920, with  
Builders Trust Company as Trustee designated as the  
"Robert Butler Trust".

In the Matter of the Trust Created by Walter Butler under  
Written Indenture of Trust Dated June 18, 1920, with  
Builders Trust Company as Trustee designated as the  
"Effie Butler O'Connor Trust".

Builders Trust Company,

*Petitioner,*

vs.

Walter P. Butler, Helen W. Butler, Effie Butler O'Connor,  
William Vernon O'Connor, Rosemary O'Connor Doll, Walter  
Butler O'Connor and Richard O'Connor; Builders Trust  
Company and James R. Farley, Co-Trustees of Trust created  
under Indenture of Trust on June 18, 1920, by Walter  
Butler for the benefit of Walter P. Butler, Robert Butler,  
Walter Butler III, Mary Butler and Catherine Butler,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI, ASSIGNMENT  
OF ERRORS AND BRIEF IN SUPPORT OF PETITION.**

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**PETITION**

*To the Honorable Chief Justice and Associate Justices of the  
Supreme Court of the United States:*

Your petitioner, Builders Trust Company, a Minnesota corporation trust company, prays that a Writ of Certiorari issue directing the Supreme Court of the State of Minnesota to certify to this Honorable Court, for its review and determination, the cause therein entitled,

**"In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee;**

**"In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee designated as the 'Robert Butler Trust'.**

**"In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee designated as the 'Effie Butler O'Connor Trust'.**

**Builders Trust Company**

**Petitioner,**

vs.

**"Walter P. Butler, Helen W. Butler, Effie Butler O'Connor, William Vernon O'Connor, Rosemary O'Connor Doll, Walter Butler O'Connor and Richard O'Connor; Builders Trust Company and James R. Faricy, Co-Trustees of Trust created under Indenture of Trust on June 18, 1920, by Walter Butler for the benefit of Walter P. Butler, Robert Butler, Walter Butler III, Mary Butler and Catherine Butler,**

**Respondents,"**

being cause No. 34228 of the Supreme Court of the State of Minnesota, wherein the final judgment of said State Supreme Court was entered on the 13th day of March, 1947, affirming

the final Order of the District Court in and for the County of Ramsey, State of Minnesota, as modified in accordance with the decision of said State Supreme Court (such decision being represented by and including the opinion of said State Supreme Court mentioned as such in the said final judgment of said State Supreme Court); and your petitioner, Builders Trust Company, among other things, hereby petitions for review, upon Writ of Certiorari, of the aforesaid decision and judgment of the Supreme Court of the State of Minnesota, aforesaid, said Supreme Court of the State of Minnesota being the Court of last resort of that State. The petitioner, Builders Trust Company, respectfully shows:

#### **Summary Statement of the Matters Involved**

The petitioner, Builders Trust Company, since its incorporation, in 1920, has been and now is a corporation, duly created, qualified and authorized to transact business, as a Trust Company within and under the laws of the State of Minnesota. The petitioner ever since the creation the three separate Trusts, here involved, namely: "In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee", designated as the Walter Butler Trust; "In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee, designated as the Robert Butler Trust"; and "In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee, designated as the Effie Butler O'Connor Trust", by the terms of the applicable indenture of trust, in each case, has been the duly appointed, qualified and acting sole trustee of each such trust, and its appointment as such trustee, in each case, has been duly confirmed by the order of the District Court of Ramsey County, Minnesota,

in and by proceedings duly had and taken pursuant to Sec. 8100-11 Mason's Minn. Statutes 1927, 1940 Supplement (Record pp. 46, ff. 138, Ramsey Co. Minn. Dist. Ct. file No. 245857-3, separate Orders confirming Trustee and Acceptances, dated January 30, 1943, Findings, Conclusions and Order dated February 26, 1943) (Rec. pp. 45 to 56 incl., ff. 133 to 168 incl.)

The petitioner, as such trustee, under and pursuant to Sec. 8100-13, Mason's Minn. Statutes, 1927, 1940 Supplement, duly made and filed its petition addressed to said District Court for the order of said District Court construing certain provisions of said Indentures of Trust, common to the same and identical in form, and instructing the trustee accordingly. The subject provisions, common to the several Indentures of Trust, read as follows:

"Expenses—Trustees' compensation.

There shall be paid out of and deducted from the gross income all expenses incurred in the administration and protection of the trust estate, all taxes, and the compensation of the Trustees. The Trustee or Trustees shall have a right to receive compensation for their services, to be determined by the Trustee or Trustees, but the aggregate of such compensation shall not exceed five per cent (5%) of the gross income of the trust estate, and the amount paid to the Trustee or Trustees as such compensation at the time of the distribution of the principal of the trust estate or any part thereof shall not exceed three per cent (3%) of the principal distributed." (Rec. p. 140, ff. 418 to 420 incl.)

"Offices, Clerks, Etc.

The Trustees are hereby empowered to employ such

clerks and other persons and to do and perform such acts and things as they may deem requisite for the proper and convenient execution of said trust, and all expenses, including the compensation of the Trustees, shall be paid or provided for prior to any distribution of income or principal to the beneficiaries in this instrument designated and prior to the accumulation and addition of income to the principal or body of the trust estate." (Rec. p. 145, ff. 22, 23).

The last mentioned petition, among others, contained recitals, to the effect, that the Trustee, in respect to each such Trust, had necessarily incurred and would in the future necessarily incur expenses in and for the administration and protection of the Trust Estate and the execution of the Trust, on account of Clerk's hire, office expense and attorneys' fees; that the Trustee had construed the aforesaid subject provisions of the Indenture of Trust, in each case, as entitling the Trustee to reimbursement, in full, from the Trust Estate, or the Gross Income of the same, on account of each such item of expense theretofore and thereafter incurred by it necessarily in and for the administration and protection of the Trust Estate and the execution of the Trust, all additional to and apart from its compensation for its services as Trustee; and that the Trustee, in respect to each such Trust, contemplated the compilation of a complete accounting and it was advisable in such regard, that the Court under its Order, in the premises, construe and apply such quoted provisions and accordingly instruct the Trustee, prior to the compilation by the latter of its contemplated complete accounting, in respect to each such Trust.

The scope and purpose of the proceeding, before said District Court, under said petition, were thereby limited and restricted to the determination of pure questions of law concerned with the mere construction of the language employed in the subject Trust instrument provisions distinguishable from and exclusive of the submission or determination of any claim of the Trustee for the allowance of any item of administration expense. The material and restrictive recitals of such petition are set forth in paragraphs numbered 12, 13 and 14 of said petition, reading as follows:

"12. That your Petitioner, as Trustee, aforesaid, in respect to each such Trust contemplates presently compiling a complete account of its administration of each such Trust and hereunder seeks the construction by this Honorable Court of the aforesaid quoted provisions of the respective Indentures of Trust, in respect to the items of expenditures incurred heretofore and hereafter to be incurred by your Petitioner in its administration of each such Trust Estate and in the execution of each such Trust, as Trustee of the same, allowable as such unto your Petitioner as the Trustee, in each case, as more particularly prayed for hereinafter.

"13. That your Petitioner has construed the aforesaid quoted provisions of said Indentures of Trust to the effect that in each instance and in respect to each Trust Estate and in connection with the execution of each Trust, your Petitioner as Trustee is entitled reimbursement in full from the Trust Estate or the gross income thereof, in each instance, on account of each item of expenditure necessarily made or incurred, by it as Trustee, in and for the administration and protection of the Trust Estate in the nature of office expenses, clerk hire, attorneys' fees, taxes and of other nature from the inception of its administration of the same under each applicable Indenture of Trust without limitation in respect to time, or otherwise, all above its fees.

"14. That it is advisable that the construction of this Honorable Court in respect to the interpretation and application of the foregoing quoted provisions of said Indentures of Trust be made and incorporated in the order of this Honorable Court and that your Petitioner, as the Trustee, in each instance be accordingly instructed particularly that such be done prior to the compilation and filing of the aforesaid contemplated accounts in respect to these several Trusts to be made and filed by your Petitioner."

The testimony and evidence were accordingly restricted and limited. There was no attempt under the petition, by the testimony or otherwise, to submit for adjudication or allowance

any such expenditure or claim, and the evidence was restricted to that designed to acquaint the Court with the methods pursued and required to be pursued in the administration of the subject trust estates and the various purposes, in such connection, on account of which the trustee was required to incur administration expenses.

(Petition, Rec. pp. 1 to 11, incl., ff. 1 to 33, incl.)

(Settled Case, Rec. pp. 45 to 123, incl., ff. 133 to 369, incl.)

The sphere of this case thus circumscribed, apart from the petition, is manifested by the petitioner's opening statement, (Rec. pp. 45 to 56, incl., ff. 133 to 168, incl.) and by the evidence adduced upon the hearing and contained in the settled case herein (Rec. pp. 45 to 123, incl., ff. 133 to 369, incl.). The evidence adduced was restricted to that calculated to generally demonstrate the methods of administration which had been consistently pursued, by the trustee, and which were common to the several estates here involved, and the necessities of the same in respect, particularly, to the various types of expenses, common thereto, and consistently required therefor, and incurred by the trustee, on account of requisite clerical work, legal services, office space, vault spaces and other sundry office items.

The trustee, in the District Court, sought and contended for the order of said Court determining the questions of law presented, in such connection, and construing the subject trust instrument provisions to the effect that by virtue thereof, among other things, the trustee, in respect to each such trust, from the inception of its administration of the same, was thereby empowered to incur reasonable expenses for and on account of clerical work, legal services, office space, vault space and sundry office items of other nature, necessary for the proper administration and protection of the trust estate and the proper and convenient execution of the trust, and to deduct or pay the full amount of each such item of necessary expense, incurred by the trustee, from and after the inception of its administration of the trust, without limitation in respect to time, from the gross income thereof or from the trust estate, additional to taxes and the compensation of the trustee, computed as provided in and by the aforesaid subject trust

instrument provisions (Petition, pp. 1 to 11, incl., ff. 1 to 33, incl.). (Opening statement Rec. pp. 45 to 56, incl., ff. 133 to 168, incl.)

Except for its activities, from 1920 to 1927, as Trustee, of two trusts created by John Butler and Emmett Butler; the business operations and activities of petitioner, Builders Trust Company, have been restricted and confined to its administration, as trustee, in each respective case, of six separate trusts, created by Walter Butler, late of Ramsey County, Minnesota, Trustor, under a separate Indenture of Trust, in each case, with petitioner, Builders Trust Company, Trustee, and three minor trusts subsidiary to one of said six trusts. The said six separate trusts, created by Walter Butler, indicative of the beneficiary in each instance, are respectively designated as "the Walter Butler Trust," "the Helen W. Butler Trust," "the Walter P. Butler Trust," "the Effie Butler O'Connor Trust," "The Robert Butler Trust" and "the John E. Butler Trust".

(Rec. pp. 58 to 62 incl., ff. 174 to 181 incl.)

(Petitioner's Exhibit "F", Indentures of Trust, Rec. pp. 98, 99, ff. 294 to 296, incl.; pp. 129 to 150, incl., ff. 385 to 450, incl.)

The evidence, before the District Court, was conclusively to the effect that the proper administration of such Trust Estates and the proper execution of the applicable Trusts, by petitioner as Trustee, under the pertinent Indentures of Trust, from the inception of petitioner's activities in such regard, until the present, consistently and necessarily involved the employment of clerks in and for the performance of clerical work constantly requisite and directed to such administration of said Trust Estates and such execution of said Trusts and the incurring, by petitioner, as such Trustee, of administration expenses therefor.

(Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.)

Such evidence was further conclusively to the effect that the proper administration of said Trust Estates and the proper execution of said Trusts, by petitioner, as such Trustee, under the pertinent Indentures of Trust, all during the aforesaid

period of petitioner's activities in such regard, consistently and necessarily involved the procurement and maintenance of office headquarters and the procurement and use of vault spaces, the employment of legal counsel and the incurring by petitioner, as such Trustee, of administration expenses therefor.

(Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.)

The evidence before the District Court was conclusively to the effect that the aforesaid necessary clerical work for and directed to such trust administration purposes involved book-keeping, accounting, general office work, the procurement of information relative to the availability and market values of investment securities for consideration and use in connection with the Trustee's activities relating to the investment, reinvestment and the retention in investments of the funds of said Trust Estates; that such necessary clerical work for said purposes was performed, at all times, by clerical employees under the supervision and subject to the direction of the petitioner Trustee; that such necessary clerical work for and directed to such trust administration purposes from 1932 and thereafter until the time of the hearing before the District Court, was regularly performed by two persons employed therefor by the Trustee, namely Messrs. Eriksen and Faricy, on account whereof the Trustee regularly incurred monthly expense represented by salaries required to be paid by it therefor to Messrs. Eriksen and Faricy in the amounts of \$150.00 and \$330.00, respectively; that all such clerical work, by Messrs. Eriksen and Faricy, was necessary and directed to the proper administration of said Trust Estates and the proper execution of said Trusts, by petitioner as such Trustee, and that said monthly salaries incurred and paid therefor, have been consistently representative of reasonable expenses incurred by petitioner, Builders Trust Company, Trustee, for clerical work actually performed and requisite to the proper administration of such Trust Estates and the proper execution of said Trusts, by petitioner-trustee.

(Rec. pp. 61 to 66, incl., ff. 183 to 198, incl.)

(Rec. pp. 81, 82, ff. 243, 244).

The Trustor, Walter Butler, was active, as a member of the Board of Directors and as an officer of petitioner, in the conduct of its business operations from 1920, the time of their inception, until and including the year 1933, the time of his death. (Rec. pp. 77 to 79, incl., ff. 230 to 237, incl.) He actually participated in the conduct of the Trustee's administration of the subject Trusts. He construed and applied the provisions of the applicable Indentures of Trust, hereinabove quoted as empowering the Trustee to provide for the performance of clerical work necessary to the administration of the subject Trusts and to incur reasonable expenses on such account and to apportion such expenses among and to pay the same from the several Trust Estates on a pro rata basis. (Rec. Reso. pp. 97 to 99, incl., 127, ff. 289 to 297, incl., 379 to 381, incl.)

The petitioner, at all times since the inception of its activities as such Trustee, has had and still retains the possession of the assets of the respective Trust Estates, except in regard to portions of the same shown to have been disbursed to beneficiaries, on account of their distributive shares, and to the Trustee on account of Trustee's compensation and expenses of administration. (Rec. p. 96, f. 288). Between and including 1920 and 1927 nothing was actually deducted therefrom on account of Trustee's compensation and actual deductions from gross income were limited to partial payments on account of Trustee's incurred administration expenses (Rec. p. 110, f. 328, Rec. p. 96, f. 288). The Trustee from the inception of the several trusteeships has made partial deductions on account of administration expenses incurred by it. (Rec. p. 97, f. 289). No accounting has been prepared or filed for allowance in the District Court or elsewhere in respect to any of the Trusts here involved, and the matter of allocations of accumulated income or balances of gross income has been held open to be dealt with and settled under a comprehensive Trustee's account in regard to each separate trust. (Rec. p. 121, f. 362, 363). Preliminary to the compilation and filing of such complete accountings which the petitioner, as such Trustee, intends to make and submit to the proper court, because of questions raised in respect to the proper construction of the above quoted trust instrument provisions, this

proceeding was instituted, under the state statute aforesaid, by the petitioner, as such Trustee, for the restricted purpose of obtaining the entry of an order of the District Court determining the pure question of law involved by the construction or interpretation of the language of the submitted trust instrument provisions and for no other purpose. (Rec. pp. 76, 77, ff. 226 to 229, incl.)

The evidence, before the District Court, established, without controversy, that the Trustee, in each instance, had made distribution of a portion of income and principal to the beneficiaries presumably in accordance with the applicable provisions of the trust instrument; that the Trustee, in each instance, had made deductions from income merely in partial payment of its compensation and merely in partial reimbursement of its administration expenses; that the Trustee quarterly issued statements to the beneficiaries, in each case, merely in respect to receipts and disbursements; that in no case had the Trustee issued any statement of accounts which purported to include all claims which the Trustee might have had for deduction from income on account of its administration expense; that the matter of the final allocation of the considerable undistributed income, in each case representing approximately \$600,000, was intended to be dealt with in the future under the contemplated original comprehensive account of the Trustee; that the Trustee had made ample provision for the deduction of reimbursement on account of all its administration expenses which had not been reimbursed to the Trustee by deductions from income by the retention in the possession of the Trustee of the undistributed and unexpended portions of income aggregating as aforesaid, in each case, approximately \$600,000. (Rec. pp. 45 to 160, incl., ff. 133 to 480, incl.)

The subject Order of said District Court was entered in this proceeding, in said District Court, December 18, 1945. The said District Court incorporates recitals indicative of said Court's construction of the petition and the evidence as restricting the scope of the subject proceeding to the submission and determination of mere questions of law involved by the construction or interpretation of the hereinabove quoted

trust instrument provisions. The District Court Order, immediately preceding the complete quotation of said trust instrument provisions therein contained, set forth the following construction of the scope of the subject proceeding:

"Petitioner prays the Court's instructions as to the proper interpretation as respects the provisions for expenses allowable to the Trustee in the following provisions of the several trust instruments under which it is acting as Trustee, said provisions being common to all of the Trusts here involved."

Immediately succeeding such quotation therein of the aforesaid trust instrument provisions, the said District Court Order provided as follows:

"It is the opinion of the Court and the Court instructs the trustee that said provisions of said instruments mean and include such expenses incurred in the management and administration of each separate trust as are peculiar to each such trust. They do not cover or include expenses incurred or paid in the general conduct of the business of the trust company. To be specific, and giving effect to the testimony adduced on the hearing, the trustee is instructed that the salaries paid to Messrs. Farley and Erickson, now and for a long time past employed by the trust company, are and have been expenses incurred in the general operation of the business of the company. The rent paid by it for office space has been and is such a general business expense. So are expenditures by it for light, general and ordinary telephone service, and stationery. No part of such expenditures may be charged against the trust funds involved in this proceeding. It has been shown that the trust company has paid income taxes separately assessed against it on account of part of the income of each trust. It has hired separate safety deposit boxes for each trust. As to one trust, there is an individual cotrustee for whom a separate bond has been required and the trust company has paid the premium thereon. It is said that it has been necessary that the company employ an attorney to appear for it and present to the Court matters separately pertaining to one

or more of said trusts. All of these are expenditures properly chargeable against the trusts in behalf of which they were made."

(Rec. pp. 18 to 21, incl., ff. 54 to 63, incl.)

The proceeding here in question was instituted pursuant to Sec. 501.35, Minnesota Statutes Annotated 1945, Mason's Minnesota Statutes 1927, 1940 Suppl. Sec. 8100-13, and therein the Trustee sought merely the Court's interpretation or construction of the hereinabove quoted trust instrument provisions identical in form and common in respect to all of the three trusts here involved. The said statutory provisions, as material here, read as follows:

"Any trustee whose appointment has thus been confirmed at any time thereafter may petition the Court for instructions in the administration of the trust or *for a construction of the trust instrument*, or upon or after the filing of any account, for the settlement and allowance thereof. Upon the filing of such petition the Court shall make an order fixing a time and place for hearing thereof, unless hearing has been waived in writing by the beneficiaries of such trust. \* \* \* Upon such hearing the Court shall make such order as it deems appropriate, which order shall be final and conclusive as to all matters thereby determined and binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the Supreme Court may be taken from such order within 30 days from the entry thereof by filing notice of appeal with the clerk of the District Court, who shall mail a copy of such notice to each adverse party who has appeared of record."

The aforesaid statutory provisions incorporated in said Sec. 501.35, Minnesota Statutes Annotated 1945, were enacted as Sec. 3 of Chap. 259, Laws of Minnesota 1933, in said last named year.

The petitioner, pursuant to the governing state statute, Sec. 501.35, Minnesota Statutes Annotated 1945, Sec. 3 of Chap. 259, Laws of Minnesota 1933, Sec. 8100-13, Mason's Minnesota Statutes 1927, 1940 Suppl., duly appealed from

said District Court Order to the Supreme Court of Minnesota. The petitioner duly filed its notice of appeal to the Supreme Court of Minnesota from said District Court Order and the whole thereof, with the clerk of said District Court on January 14, 1946, and said clerk of said District Court, pursuant to said state statute, at petitioner's instance, duly mailed a copy of said Notice of Appeal to each adverse party who appeared of record and to all other parties who appeared of record in said proceeding, on January 16, 1946. The said Notice of Appeal as filed with the clerk of said District Court contained attachments in the nature of proof of service of such Notice of Appeal upon the adverse parties or their attorney, the District Court and other parties of record (Notice of Appeal and Proof of Service and filing January 14, 1946, Rec. pp. 22 to 27, incl., ff. 64 to 80, incl.; copy of Notice of Appeal and extra Proof of Service and mailing by Clerk, filed January 16, 1946, Rec. pp. 27 to 33, incl., ff. 79 to 99, incl.) The petitioner's bond on such appeal was duly approved by said District Court and was duly filed with the clerk of said District Court on January 14, 1946 (Rec. pp. 34 to 38, incl., ff. 100 to 112, incl.) The Clerk of said District Court made due return to said State Supreme Court in respect to said appeal and caused certified copies of all such documents, the Notice of Appeal, Proof of Service thereof, Clerk's Affidavit of Mailing of copies of Notice of Appeal, and petitioner's bond, as the appellant in respect to such appeal, to be prepared and delivered to and filed with the Clerk of said State Supreme Court (Rec. Proc. St. Supr. Ct. pp. 218 to 227, ff. 596 to 613).

The said appeal of the petitioner, Builders Trust Company, to said State Supreme Court from said Order of said District Court was heard and said State Supreme Court entered its Opinion thereon in said Court on the 17th day of January, 1947, providing for the affirmance of said District Court Order or Judgment as modified in accordance with the Opinion of said State Supreme Court. (Rec. Proc. St. Supr. Ct., pp. 161 to 183, incl., ff. 481 to 526, incl.)

The Final Judgment of said State Supreme Court affirming said Order of said District Court was entered and docketed in said State Supreme Court on the 13th day of March,

1947. (Rec. Proc. St. Supr. Ct., pp. 215 to 216, incl., ff. 590 to 592, incl.)

The Petitioner neither sought nor had any opportunity in this proceeding to submit or establish any claim on account of any item of administration expenses; that the Petitioner, therein, neither sought nor had any opportunity to be heard on any question of waiver or forfeiture of any such claim; and that there was no issue presented or litigated in respect to the allowability of any claim of the Petitioner for any item of administration expense or in respect to any claim of waiver or forfeiture of any such claim of the Petitioner. The Petitioner has not been afforded the opportunity to be heard in respect to any such matter and the State Supreme Court Opinion and Final Judgment, herein, unlawfully deprive Petitioner, Builders Trust Company, of all existing remedies for the enforcement of its claims against the Trust Estates, respectively, for reimbursement to Petitioner-Trustee of administration expenses, incurred and paid by the latter, in reliance upon the plain provisions of the subject Indentures of Trust authorizing the Trustee to incur such administration expenses and to pay and provide for the payment of the same from income; that said State Supreme Court Opinion and Final Judgment unlawfully deprive Petitioner of its right to be heard in respect to such claims for administration expenses and unlawfully destroy all right and property of the Petitioner represented by its claims for administration expenses without there having been afforded to Petitioner a real opportunity to protect such right and property; and that the State Supreme Court Opinion and Final Judgment, herein, unlawfully deny, violate and destroy Petitioner's right to be heard upon such claims of Petitioner and unlawfully deprive the Petitioner of an opportunity to be heard thereon and Petitioner's right and property in respect to its claims aforesaid; all in violation of Amendment XIV to the Constitution of the United States of America.

(Petition Rec. pp. 1 to 11, incl. ff. 1 to 33, incl., Settled Case Rec. pp. 45 to 160, incl. ff. 133 to 480, incl.) (State Supreme Court Opinion and Final Judgment Rec. Proc. St. Supr. Ct., pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl.)

The said State Supreme Court, by its said Opinion and Final Judgment, affirmed the similar adjudication of disallowance contained in said District Court Order and adjudged the aforesaid administration expenses incurred by the Trustee and represented by the salaries paid by the latter to Messrs. Faricy and Eriksen for the aforesaid clerical work requisite and directed to the proper administration of the subject Trust Estates and the proper execution of the subject Trusts, wholly disallowable as charges in favor of the Trustee against the Trust Estates or any of the same. (Rec. Proc. St. Supr. Ct., pp. 162 to 183, incl., ff. 484 to 526, incl., pp. 215, 216, ff. 590 to 592, incl.)

The said State Supreme Court, by its said Opinion and Final Judgment, and by the aforesaid adjudication of disallowance of such administration expenses, those mentioned in the next preceding paragraph hereof, violated the due process clause of Section 1 of Amendment XIV to the Constitution of the United States of America and unduly violated, denied and destroyed the Petitioner's seasonably set up and claimed Federal constitutional rights under said Section 1 of Amendment XIV to the Federal Constitution, to due process of law, to a real opportunity to present evidence and be heard upon each such matter and administration expense and Petitioner's several claims arising therefrom as conditions precedent to such adjudication of disallowance. (Rec. Proc. St. Supr. Ct., pp. 162 to 211, incl., ff. 484 to 581, incl.)

The said State Supreme Court, by its said Opinion and Final Judgment, without there having been any decision in such respect incorporated in or represented by said Order of said District Court, and without there having been any pertinent issue or evidence under the record, adjudged all theretofore incurred and unpaid Trustee's administration expenses as waived and forfeited by the petitioner, Trustee, and therefore wholly disallowable as charges in favor of the Trustee against the Trust Estates or any of the same. (Rec. Proc. St. Supr. Ct., pp. 162 to 183, incl., ff. 484 to 526, incl., pp. 168, 169, ff. 495 to 498, incl., pp. 215, 216, ff. 590 to 592, incl.)

The said State Supreme Court, by its said Opinion and

Final Judgment, and by the aforesaid adjudication of waiver, forfeiture and disallowance of such administration expenses, those mentioned in the next preceding paragraph, violated the due process laws of Section 1 of Amendment XIV to the Constitution of the United States of America and unduly violated, denied and destroyed the Petitioner's seasonably set up and claimed Federal constitutional rights under said Section 1 of Amendment XIV to the Federal Constitution, to due process of law, to a real opportunity to present evidence and be heard upon each such matter and administration expense and Petitioner's several claims arising therefrom and any question of waiver or forfeiture in respect to each such claim, as conditions precedent to such adjudication of disallowance. (Rec. Proc. St. Supr. Ct., pp. 162 to 183, incl., ff. 484 to 526, incl., pp. 215, 216, ff. 590 to 592, incl.)

The Petitioner respectfully directs the attention of this Honorable Court to the following excerpts from the Dissenting Opinion entered and filed in said State Supreme Court in this proceeding and which accurately analyze and digest the pertinent portions of the Record, viz:

"Here, at the proper time, of course, the trustee, should have the burden of establishing that the expenditures in question were reasonable and necessary because of the heavy responsibility and numerous complications involved relative to these large trusts, and ordinarily this question should be determined at the time the trustee submits its accounts for approval by the court. Up to the present time this has not been done. Apparently, neither the trustee nor objectors intended to present evidence relative to such expenditures, the necessity and reasonableness thereof, or other details relative thereto. Some testimony was taken on this issue, but it was limited to rather general statements and conclusions and no accounts were submitted for allowance."

(Rec. Proc. St. Supr. Ct., pp. 181 to 181, incl., ff. 522 to 522, incl.)

"The Court, however, not only construed the paragraphs, but determined finally that expenditures for

clerical help and office rent were not peculiar to the trusts and not properly chargeable to them. Its determination of this respect was directly contrary to such evidence as was submitted. When the Trustee's annual or final accounts are presented for allowance, both parties here should have full opportunity to submit material evidence in support of their respective contentions. The Trustee, on the one hand, should have the right to establish that the items charged are true and correct, that the services for which the charges were made were reasonable and necessary and were limited to the trusts involved, and other like issues customarily present when a trustee's account is presented for allowance. Objectors should have a like opportunity to submit evidence establishing that the services were unreasonable and unnecessary, or that they were not limited to the trusts involved, but extended to other business undertakings of the trustee, or that the trustee had waived or lost its right to reimbursement therefor. It has been urged that because the trustee did not deduct such expenditures from the income already distributed it thereby waived its right to the same insofar as past distributions are concerned. This issue was not presented by the pleadings, nor tried by consent, nor determined by the trial court's order. It appears for the first time here. \* \* \* \* There is no evidence in the record that the trustee has manifested any intention to forego any claims for the expenditures above described."

(Rec. Proc. St. Supr. Ct., pp. 181 to 183, incl., ff. 522 to 525, incl.)

The State Supreme Court, under its said Opinion and Final Judgment has disregarded the definitive and restrictive allegations of the petition hereinabove quoted, in their entirety, and makes reference to general phraseology in portions of the prayer of the petition for which it seeks a basis for the conclusion expressed, in the opinion, to the effect that the petition "called not only for answers to abstract questions of legal construction but for an adjudication of specific items of expense whereby such items were to

be allowed or disallowed." The quoted construction of the pertinent parts of the prayer of the petition is not justified by nor does the same accurately reflect the prayer. However, under the Minnesota law then and theretofore established, the prayer is no criterion in respect to the scope of the proceeding and may not extend the same beyond its proper purview as defined by the facts alleged. See Sec. 261, Dunnell's Minnesota Pleading, Second Edition, which contains the following language:

"The demand for relief is no part of the cause of action and is not traversable." \* \* \* \* "The nature of the cause of action and the nature and extent of the relief awarded are determined by the facts alleged and proved and not by the demand for relief."

Each separate Indenture of Trust, here involved, constitutes a contract within the meaning and protection of Sec. 10 of Article I of the Federal Constitution and Sec. 1 of said Amendment XIV to said Federal Constitution, the pertinent portions of which constitutional provisions, respectively, reads as follows, viz:

"No State shall pass any law impairing the obligations of contracts." (Sec. 10 of Art. I, Fed. Const.)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Sec. 1, Amend. XIV Fed. Const.)

The Petitioner, within the time provided therefor under the order of the State Supreme Court, entered in the premises on the 28th day of February, 1947, duly made and filed its written Petition for Rehearing and therein, among other things, specially set up and claimed that the aforesaid Opinion of said State Supreme Court, in the particulars aforementioned herein and in the particulars mentioned in said

Petition for Rehearing, impaired the obligations of the contracts or Indentures of Trust, here involved, in violation of the inhibitions and the Petitioner's rights, privileges and immunities under said Sec. 10 of said Article I of said Federal Constitution and deprived Petitioner of his right to due process to present evidence and to be heard upon all questions relative to Petitioner's expenditures as Trustee and claims of the Petitioner arising therefrom and Petitioner's rights and property represented by such claims in violation of and in denial of the Petitioner's rights under said Sec. 1 of said Amendment XIV to said Federal Constitution. The said Petition for Rehearing was addressed to said State Supreme Court and duly filed and presented to said last named Court in this proceeding prior to the entry of the aforesaid final judgment of said State Supreme Court. The said Petition for Rehearing, by reference, is hereby incorporated in this Petition, with the same intent, purpose and effect as if the same were fully set forth herein, word for word. (Petition for Rehearing Rec. Proc. St. Supr. Ct., pp. 183 to 211, incl., ff. 526 to 582, incl.) The State Supreme Court, in this proceeding, reviewed, considered and denied said Petition for Rehearing and each aforesaid claim, right privilege and immunity under the Federal Constitution thereby specially set up and claimed by Petitioner. (Order of St. Supr. Ct. denying Petition for Rehearing Rec. Proc. St. Supr. Ct. pp. 211 to 212, incl., ff. 582 to 583, incl.) The State Supreme Court Order denying said Petition for Rehearing was entered on the .... day of March, 1947. Thereafter, as aforesaid, the Final Judgment of said State Supreme Court affirming said Order of said District Court as modified in accordance with said State Supreme Court Opinion, was entered and docketed in said State Supreme Court on the 13th day of March, 1947. (Rec. Proc. St. Supr. Ct. pp. 215 to 216, incl., ff. 590 to 592, incl.) The Decision upon the federal questions specially set up and claimed by the Petitioner, as aforesaid, was necessary to the determination of this cause and the said Opinion and Final Judgment of said State Supreme Court rejected and denied, in substance and effect, every federal constitutional claim, right, privilege and immunity and every federal constitutional

question set up and claimed by the Petitioner and duly presented for decision by said State Supreme Court, in the proceedings here involved, under and by said Petition for Rehearing.

#### Questions Presented

1. In the proceeding here involved, where the Trustee has sought merely the interpretation of the subject Trust Instrument provisions and instructions accordingly under the Order of the District Court, as distinguished from the submission for allowance of any claim for deduction in its favor from the Trust Estate funds, the issues and the evidence having been accordingly limited; is either the State District Court or the State Supreme Court empowered to adjudicate the disallowance of specific expenditures of the Trustee for the administration of the subject trusts and thereby preclude the subsequent assertion of any claim on such account by the Trustee without there having been afforded to the latter the minimum requirements of due process under Sec. 1 of Amendment XIV to the Federal Constitution and without affording and in denial of the right of the Trustee, Petitioner herein, under said Federal constitutional provisions, to be heard upon evidence in respect to the establishment, protection and enforcement of its claims against several Trust Estates arising from its proper trust administration expenses?

2. Whether the said State Supreme Court Opinion and Final Judgment, affirming the similar adjudication of disallowance contained in said District Court Order, adjudging the aforesaid administration expenses incurred by the Trustee and represented by the salaries paid by the latter to Messrs. Faricy and Eriksen for the aforesaid clerical work requisite and directed to the administration of the subject Trust Estates and the execution of the subject Trusts, wholly disallowable as charges in favor of the Trustee against the subject Trust Estates or any of them without affording to the Petitioner any real opportunity to present evidence and be heard upon each such matter of administration expense and Petitioner's several claims arising therefrom violated the due process clause of Sec. 1 of Amendment XIV to the

Federal Constitution and representing a violation, denial or destruction of Petitioner's federal constitutional rights under said Sec. 1 of Amendment XIV to the Federal Constitution to due process of law in the premises.

3. Whether the said State Supreme Court Opinion and Final Judgment, adjudging all theretofore incurred and Trustee's administration expenses as waived and forfeited by the Petitioner, Trustee, and wholly disallowable as charges in favor of the Trustee against the Trust Estates or any of the same without affording to the Petitioner any real opportunity to present evidence and be heard upon such matter of administration expenses and Petitioner's several claims arising therefrom and without there having been any decision in such respect incorporated in or represented by said Order in said District Court and without there having been any pertinent issue or evidence under the Record violated the due process clause of Sec. 1 of Amendment XIV of the Federal Constitution or constituted a denial of Federal constitutional rights to due process in the premises and granted to Petitioner by virtue of said Sec. 1 of said Amendment XIV to said Federal Constitution.

4. Whether the said State Supreme Court Opinion and Final Judgment impaired the obligations of the subject contracts, the several Indentures of Trust here involved, in violation of the inhibitions of Sec. 10 of Article I of the Federal Constitution, in the particulars set forth under the aforesaid Petition for Rehearing, by manifest changes in the laws of the State of Minnesota which formed a part of and represented the obligations of said contracts.

5. Whether the said State Supreme Court Opinion and Final Judgment violated the Petitioner's asserted federal constitutional right to freedom of contract secured to the Petitioner and specially set up and claimed by the latter, in the proceedings here involved under said Sec. 1 of said Amendment XIV to the Federal Constitution by the rejection therein of the plain meaning of the language of such contracts, in each instance in substantive and material particulars, and the substitution therefor, represented in said

Opinion and Final Judgment, of inconsistent general principles relative to trust administration; all such having been done to the substantial prejudice of the Petitioner and unwarranted deprivation of his Federal constitutional rights to life, liberty and property, secured to the Petitioner as aforesaid under said Federal Constitutional provisions.

#### Statement of Jurisdiction

The said Supreme Court of the State of Minnesota is the highest court of the State of Minnesota in which a decision could be had in a cause of this character. The said Final Judgment of said Supreme Court of the State of Minnesota was entered and docketed therein, in this cause, on the 13th day of March, 1947.

There is drawn in question, in this cause, the validity of the Opinion and Final Judgment of the Supreme Court of the State of Minnesota, in this cause, on the ground that the same are repugnant to the Constitution of the United States.

The Petitioner, in this cause, in and by its said Petition for Rehearing, (Rec. Proc. St. Supr. Ct., pp. 183 to 211, incl., ff. 526 to 582, incl.) specially set up and claimed rights, privileges and immunities under the Constitution of the United States, particularly under the clauses relating to and incorporating inhibitions against State action in passing laws impairing the obligations of contracts contained in Sec. 10 of Article I of the Federal Constitution and under the due process provisions of said Federal Constitution, contained in Sec. 1 of Amendment XIV to said Federal Constitution forbidding any State to deprive any person of life, liberty or property without due process of law, which Federal Constitutional claims of the Petitioner were, in each instance, wholly denied, and violated by the said Opinion and the said Final Judgment of said State Supreme Court. (Rec. Proc. St. Supr. Ct., pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl.)

This Honorable Court has jurisdiction to review this cause and the said Final Judgment of the Supreme Court of the State of Minnesota in this cause by virtue of the provisions of Judicial Code, Sec. 237 as amended, Title 28 U. S. C. A., Sec. 344, subdivision (b), which reads as follows:

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question of validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph, nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

There are presented in this cause special and important reasons for the review of this cause on writ of certiorari hereby sought. The Supreme Court of the State of Minnesota in this cause, has decided several federal questions of substance in a way probably not in accord with the applicable decisions of the Supreme Court of the United States.

The said Opinion and said Final Judgment of said State Supreme Court in their effect unduly impair the obligation of the contracts here involved in violation of said Sec. 1 of said Article I of the Federal Constitution and unduly deprive the Petitioner of its liberty and freedom of contract and property without due process of law in violation of Sec. 1 of Amendment XIV to the Federal Constitution, all in denial of the several federal constitutional claims, right

privileges and immunities specially set up and claimed under the Petitioner's aforesaid Petition for Rehearing in said State Supreme Court. The aforesaid Opinion and Final Judgment of the State Supreme Court, in respect to the adjudications of disallowances of administration expenses incurred by the Petitioner as Trustee of the several pertinent trusts, in each instance, were made and entered without notice, hearing or evidence and contrary to all of the evidence adduced in this proceeding and shown under the Record; all in violation of the rights and claims of the Petitioner secured to the latter by said Sec. 10 of Article I of the Federal Constitution and said Sec. 1 of Amendment XIV to said Federal Constitution, and specially set up and claimed by the Petitioner under and by its aforesaid Petition for Rehearing, in this proceeding, before said State Supreme Court.

(Rec. Proc. St. Supr. Ct. pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl., pp. 183 to 211, incl., ff. 526 to 582, incl.)

#### Reasons for Allowance of Writ

The Petitioner, under this subdivision, refers to the previous subdivisions of this Petition and the numerous statements therein set forth as reasons for the issuance of Writ of Certiorari hereby sought. The Petitioner, respectfully, submits that there were presented, in this cause, federal questions, specially set up in the said Petition for Rehearing, by Petitioner whereunder Petitioner set up and claimed rights, privileges and immunities under Sec. 10 of Article I of the Federal Constitution and Sec. 1 of Amendment XIV of the Federal Constitution; that said federal questions were decided by said State Supreme Court, by its said Opinion and said Final Judgment, in this cause, in a way not in accord with the applicable decisions of this court, and that the federal questions thus presented and determined were substantial in character.

(Rec. Proc. St. Supr. Ct. pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl., pp. 183 to 211, incl., ff. 526 to 582, incl.)

The State Supreme Court Opinion and Final Judgment, in this cause, are at material variance with the decisions of this Honorable Court, and in the particulars hereinbefore mentioned, deprive Petitioner of its liberty and freedom of contract and property without due process of law and the enforcement of said Final Judgment of said State Supreme

Court, will deprive Petitioner, as distinguished from others, substantial Federal Constitutional rights secured to it as aforesaid by said Sections of the Federal Constitution, all to the substantial and irreparable loss and detriment of the Petitioner and without there having been afforded to the Petitioner the minimal requirements of due process of law secured to Petitioner by said Sec. 1 in said Amendment XIV to the Federal Constitution.

(Rec. Proc. St. Supr. Ct. pp. 161 to 183, incl., ff. 481 to 526, incl., pp. 215, 216, ff. 590 to 592, incl., pp. 183 to 211, incl., ff. 526 to 582, incl.)

WHEREFORE, in view of the premises, your Petitioner prays that this Honorable Court grant and issue its Writ of Certiorari directed to the Supreme Court of the State of Minnesota commanding that the complete transcript of the Record and all Proceedings in this cause in said Court, and its Final Judgment thereon, be certified to this Honorable Court, and that this Honorable Court will thereupon proceed to correct the errors herein cited and complained of and reverse the judgment of said Supreme Court of the State of Minnesota, in this cause.

BUILDERS TRUST COMPANY, a Minnesota corporation,  
Petitioner.

LOUIS P. SHEAHAN,

SAMUEL LIPSCHULTZ.

Petitioner's Attorneys  
1300 Minnesota Building,  
St. Paul 1, Minnesota.

IN The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1947  
No. \_\_\_\_\_

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee.

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with

Builders Trust Company as Trustee, designated as the "Robert Butler Trust".

In the Matter of the Trust Created by Walter Butler under Written Indenture of Trust dated June 18, 1920, with Builders Trust Company as Trustee, designated as the "Effie Butler O'Connor Trust".

**BUILDERS TRUST COMPANY, PETITIONER,**

vs.

**WALTER P. BUTLER, HELEN W. BUTLER, EFFIE BUTLER O'CONNOR, WILLIAM VERNON O'CONNOR, ROSEMARY O'CONNOR DOLL, WALTER BUTLER O'CONNOR, AND RICHARD O'CONNOR, RESPONDENTS.**

**PETITIONER'S ASSIGNMENT OF ERRORS AND  
BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

The Supreme Court of the State of Minnesota erred in this cause in its said opinion and final judgment in the following particulars:

1. The said State Supreme Court erred in entering and docketing its final judgment affirming said District Court Order
2. The said State Supreme Court erred in adjudging the disallowance of the trust administration expenses shown by the record to have been incurred by the Petitioner as Trustee of the several trusts here involved, represented by salaries paid by the Petitioner, as such Trustee, to Messrs. Faricy and Eriksen for clerical work performed by them in the employment of the Trustee necessary and directed to the administration of the subject trust estates and the execution of the applicable trusts.
3. The said State Supreme Court erred in adjudging the disallowance of trust administration expenses shown

by the record to have been incurred by the Petitioner as Trustee of the several trusts here involved, and not theretofore paid from the Trust estates or any of the same.

4. The said State Supreme Court erred in adjudging the aforesaid administration expenses incurred by the Petitioner and represented by the salaries paid by the latter to Messrs. Faricy and Eriksen for the aforesaid clerical work requisite and directed to the proper administration of the subject trust estates and the proper execution of the subject trusts, wholly disallowable as charges in favor of the Trustee against the trust estates, or any of the same.
5. The said State Supreme Court erred in adjudging all theretofore incurred and unpaid Trustee's administration expenses waived and forfeited by the Petitioner, Trustee, and therefore wholly disallowable as charges in favor of the Trustee against the trust estates or any of the same.
6. The said State Supreme Court erred in each aforesaid adjudication of disallowance pertaining to administration expenses incurred by the Petitioner as such Trustee in the administration by Petitioner of the subject trust estates and the execution of the applicable Trusts, upon the grounds among others, that no such administration expense or claim of the Trustee for the allowance of the same was properly the subject on any such adjudication, the proceeding here in question having had for its limited scope and purpose the submission of pure questions of law relating to the proper construction or interpretation of the language of the subject trust instrument provisions to the exclusion of any other matter.
7. The said State Supreme Court erred by entering its aforesaid order denying Petitioner's aforesaid Petition for Rehearing.
8. The said State Supreme Court erred in its denial, under its aforesaid Opinion and Final Judgment, of the rights and privileges and immunities specially set up and

claimed by the Petitioner, under said Petition for Rehearing, and secured to the Petitioner under and by virtue of said Section 10 of Article I of the Federal Constitution and Section 1 of Amendment XIV to the Federal Constitution, as more particularly appears from said Petition for Rehearing.

9. The said State Supreme Court erred in its disregard of the plain meaning of the subject Trust instrument provisions and in its substitution therefore of inapplicable general principles of trust administration contrary to the established laws of the State of Minnesota which formed the obligations of the subject contracts, the several Indentures of Trust here involved, and in undue impairment of the obligations of said contracts inhibited by Section 10 of Article I of the Federal Constitution.
10. The said State Supreme Court erred in rejecting the plain meaning of the language contained in the submitted Trust instrument provisions and substituting therefore general principles of Trust administration of different import and significance, thus unduly depriving the Petitioner of its liberty and freedom of contract secured to it by Section 1 of Amendment XIV to the Federal Constitution, without due process of law.
11. The said Supreme Court erred in each aforesaid adjudication, under its said Opinion and Final Judgment, of disallowance of administration expenses aforesaid, no such expense or claim of the Petitioner thereon having been in issue in respect to allowability of the same and no hearing nor opportunity to be heard on any such expense or claim having been afforded to the Petitioner and each such adjudication having been contrary to the evidence shown by the record; all in denial of Federal due process secured to the Petitioner by said Section 1 of Amendment XIV to the Federal Constitution.
12. The said State Supreme Court erred in entering its said Opinion, in this cause, affirming and providing for the affirmation of said District Court Order as modified by said Opinion.

13. The said State Supreme Court erred in entering and docketing its said Final Judgment affirming said District Court Order as modified in accordance with said Opinion.

**BRIEF  
IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI**

**THE APPLICABLE STATE STATUTE AUTHORIZING THE INSTITUTION OF THE INSTANT PROCEEDING AND GOVERNING THE SAME IS CONTAINED IN CHAPTER 259, S. 3, MINNESOTA SESSION LAWS, 1933, (MASONS MINNESOTA STATUTES 1927, 1940 SUPPL 8100-13, MINNESOTA STATUTES ANNOTATED 1945 501.35).**

The said Statute provides:

505.35 may apply to Court for instructions.

"Any trustee whose appointment has thus been confirmed at any time thereafter may petition the court for instructions in the administration of the trust or for a construction of the trust instrument, or upon or after the filing of any account, for the settlement and allowance thereof. Upon the filing of such petition the court shall make an order fixing a time and place for hearing thereof, unless hearing has been waived in writing by the beneficiaries of such trust. Notice of such hearing shall be given by publishing a copy of such order one time in a legal newspaper of such county at least 20 days before the date of such hearing, and by mailing a copy thereof to each party in interest then in being, at his last known address, at least ten days before the date of such hearing or in such other manner as the court shall order and if such court shall deem further notice necessary it shall be given in such manner as may be specified in such order. Upon such hearing the court shall make such order as it deems appropriate, which order shall be final and conclusive as to all matters thereby determined and bind in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the supreme court

may be taken from such order within 30 days from the entry thereof by filing notice of appeal with the clerk of the district court, who shall mail a copy of such notice to each adverse party who has appeared of record."

### I OPINION OF STATE SUPREME COURT AND DISSENTING OPINION

The Opinion of the State Supreme Court and the Dissenting Opinion, in this cause, are contained in the printed Record. (Rec. Proc. St. Sup. Ct., pp. 161 to 183, Incl., ff. 481 to 525, Incl.)

### II FINAL JUDGMENT OF STATE SUPREME COURT

The Final judgment of the State Supreme Court, in this cause, affirming the Order of the District Court as modified in accordance with the said Opinion of the State Supreme Court, was entered and docketed in said State Supreme Court March 13, 1947 and a copy of said Final Judgment appears in the printed Record of Proceedings in Supreme Court of Minnesota, herewith submitted. (Rec. Proc. St. Sup. Ct., pp. 215 to 216, Incl., ff. 590 to 592, Incl.)

### III ARGUMENT

#### COURT'S JURISDICTION WAS INVOKED FOR LIMITED PURPOSE OF DETERMINATION OF QUESTIONS OF LAW RESULTING IN INTERPRETATION OF TRUST INSTRUMENT PROVISIONS AND INSTRUCTIONS ACCORDINGLY TO PETITIONER, TRUSTEE.

The submission of questions of law in respect to the proper interpretation of the subject trust instrument provisions and instructions thereon to the Petitioner-Trustee, under the Order of the Court, as distinguished from the submission of any claim of the Trustee for adjudication represented the restricted scope and purpose of the instant proceeding. (Petition, Rec. pp. 1 to 11, incl., ff. 1 to 33, incl.) The sphere of this case thus circumscribed, apart from the petition, is man-

ifested by the petitioner's opening statement (Rec. pp. 45 to 56, incl., ff. 133 to 168, incl.) and by the evidence adduced upon the hearing and contained in the settled case herein Rec. pp. 45 to 123, incl., ff. 133 to 369, incl.). The evidence adduced was restricted to that calculated to generally demonstrate the methods of administration which had been consistently pursued, by the trustee, and which were common to the several estates here involved, and the necessities of the same in respect, particularly, to the various types of expenses, common thereto, and consistently required therefor, and incurred by the trustee, on account of requisite clerical work, legal services, office space, vault spaces and other sundry office items.

The State Supreme Court Opinion in respect to such petition overlooked the restrictive and definitive allegations of the petition, embodied therein, and merely considered certain general phraseology of the prayer as the basis for the conclusion expressed in said Opinion to the effect that the Petition "called not only for answers to abstract questions of legal construction but for an adjudication of specific items of expense whereby such items were to be allowed or disallowed." The prayer of the petition afforded no criterion for the determination of the nature and scope of the proceeding. The restrictive and definitive recitals of the petition are set forth in paragraphs 12, 13 and 14 of said petition and read as follows:

"12. That your Petitioner, as Trustee, aforesaid, in respect to each such Trust contemplates presently compiling a complete account of its administration of each such Trust and hereunder seeks the construction by this Honorable Court of the aforesaid quoted provisions of the respective Indentures of Trust, in respect to the items of expenditures incurred heretofore and hereafter to be incurred by your Petitioner in its administration of each such Trust Estate and in the execution of each such Trust, as Trustee of the same, allowable as such unto your Petitioner as the Trustee, in each case, as more particularly prayed for hereinafter.

"13. That your Petitioner has construed the aforesaid quoted provisions of said Indentures of Trust to the effect that in each instance and in respect to each Trust Estate and in connection with the execution of each Trust, your Petitioner as Trustee is entitled reimbursement in full from the Trust Estate or the gross income thereof, in each instance, on account of each item of expenditure necessarily made or incurred, by it as Trustee, in and for the administration and protection of the Trust Estate in the nature of office expenses, clerk hire, attorneys' fees, taxes and of other nature from the inception of its administration of the same under each applicable Indenture of Trust without limitation in respect to time, otherwise, all above its fees.

"14. That it is advisable that the construction of this Honorable Court in respect to the interpretation and application of the foregoing quoted provisions of said Indentures of Trust be made and incorporated in the order of this Honorable Court and that your Petitioner as the Trustee, in each instance be accordingly instructed particularly that such be done prior to the compilation and filing of the aforesaid contemplated accounts in respect to these several Trusts to be made and filed by your Petitioner." (Rec. pp. 7 & 8, ff. 20 to 23 inclusive.)

The following excerpts of law are representative of the applicable Minnesota Law as the same was established on contracts here in question were made and has since continuously existed, viz:

"The demand for relief is no part of the cause of action and is not traversable."

\* \* \* \* \*

"The nature of the cause of action and the nature and extent of the relief awarded are determined by the facts alleged and proved and not by the demand for relief". (Sec. 261 Dunnell Minnesota Pleading Second Edition) See also, in support of the foregoing excerpts, Minneapolis Red Lake & Manitoba Railway Co. v. William W. Brown et al, 99 Minnesota Reports 384, and Hoffman Motor Truck Company v. John Erickson et al.

1914, 124 Minnesota Reports 279, 281.

The District Court, in the first instance, construed the Petition, as limited to the purpose of the submission, for determination by the Court, of pure questions of law relative to the proper interpretation of the meaning of the subject trust instrument provisions as evidenced by the following quoted portion of its Order, viz:

"Petitioner prays the Court's instructions as to the proper interpretation as respects the provisions for expenses allowable to the trustee in the following provisions of the several trust instruments under which it is acting as trustee, said provisions being common to all of the trusts here involved." (Rec. p. 19, ff. 55 & 56.)

The District Court, under its order, from which this appeal has been taken, transgressed the limited bounds of its jurisdiction and purported, thereby, to adjudicate the disallowance of particular expenditures and to preclude any claim of the trustee on such account. No such claim nor any of said items of expenditure purported to be adjudicated as disallowable to the trustee was submitted to the Court for allowance or adjudication, nor was any of the same the subject of any testimony or evidence directed to the presentment of the same, in said proceeding, to said District Court for allowance or adjudication. The action of the Court in such regard is assigned as error, hereinabove. (Assignments of Error.) In this connection, the District Court Order, after setting forth the subject trust instrument provisions, contains the following language:

"It is the opinion of the Court and the Court instructs the trustee that said provisions of said trust instruments mean and include such expenses incurred in the management and administration of each separate trust as are peculiar to each such trust. They do not cover or include expenses incurred or paid in the general conduct of the business of the trust company. To be specific, and giving effect to the testimony adduced on the hearing, the trustee is instructed that the salaries paid to Messrs. Faricy and Eriksen, now and for a long time

past employed by the trust company, are and have been expenses incurred in the general operation of the business of the company. The rent paid by it for office space has been and is such a general business expense. So are expenditures by it for light, general and ordinary telephone service, and stationery. No part of such expenditures may be charged against the trust funds involved in this proceeding."

(Rec. pp. 18 to 21, incl., ff. 54 to 63 incl.)

(Petition, Rec. pp. 1 to 11, incl., ff. 1 to 33 incl.)

(Opening statement—Settled Case, Rec. pp. 45 to 566, incl., ff. 133 to 168, incl.)

(Testimony Rec. pp. 57 to 123, incl., ff. 169 to 369 incl.)

The subject provisions common to the trust instruments in part provide: "There shall be paid out of and deducted from the gross income all expenses incurred in the administration and protection of the trust estate, all taxes, and the compensation of the Trustee. \* \* \* The Trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and things as they may deem requisite for the proper and convenient execution of said trust, and all expenses, including the compensation of the Trustees, shall be paid or provided for prior to any distribution of income or principal to the beneficiaries in this instrument designated and prior to the accumulation and addition of income to the principal or body of the trust estate."

(Petitioner's Exhibit F—Indentures of Trust, Rec. pp. 129 to 150, incl., ff. 385 to 450, incl.)

No accounting has been prepared or filed, in respect to any of the several trusts, here involved, in the District Court, and the matter of allocations of accumulated income or balances of gross income, in the hands of the trustee, have been held open to be dealt with and settled under a comprehensive account which appellant, as such trustee in each case, intends to compile and as a preliminary to which, because of questions raised as respects the proper construction of the above-quoted trust provisions, particularly as to the allowability to appellant, as such trustee, for deductions from gross income, of certain types of administration expenses,

additional to taxes and the trustee's compensation for services, this proceeding was instituted for the restricted purpose of obtaining the entry of the order of the District Court properly interpreting the subject trust instrument provisions and instructing the appellant, as such trustee, accordingly.

(Rec. p. 121, ff. 362, 363.)

(Rec. p. 76, f. 227.)

(Rec. pp. 76, 77, ff. 226 to 229, incl.)

The testimony was consistently to the effect, among other things, that the aforesaid necessary clerical work for and directed to such administration of said trust estates and such execution of said trusts by appellant, as trustee, from 1932 constantly until the present, has been regularly performed by two persons necessarily employed therefor by the trustee, namely, Einar Eriksen, and James R. Faricy; that appellant, as such trustee, constantly since 1932 has incurred, regularly, monthly expense on account of such necessary clerical work, performed by said Messrs. Eriksen and Faricy, representative of the salaries required to be paid by it to said Messrs. Eriksen and Faricy, therefor, viz., \$150.00 and \$330.00 respectively; that all such clerical work, by Messrs. Eriksen and Faricy, has been necessary and directed to the proper administration of said trust estates and the proper execution of the respective trusts on the part of appellant, as such trustee; and that such monthly salaries have been consistently representative of reasonable expenses incurred by appellant, as such trustee, for clerical work actually performed and required for the proper administration of such trust estates and the proper execution of such trusts, respectively, on the part of the appellant, as such trustee.

(Rec. pp. 62 to 65, incl. ff. 184 to 195, incl.)

(Rec. pp. 81, 82, ff. 243, 244.)

(Rec. pp. 62, 63, ff. 194 to 198, incl.)

(Rec. p. 63, ff. 188, 189.)

(Rec. pp. 63, 64, ff. 189, 190.)

The testimony was consistently to the effect that the trustee, for the same purposes, necessarily incurred additional

expenses for office space, vault spaces, legal services and other sundry purposes. (Rec. pp. 61 to 66, Incl. ff. 183 to 198, incl.)

The evidence adduced was restricted to that calculated to generally demonstrate the methods of administration which had been consistently pursued, by the trustee, and which were common to the several estates here involved, and the necessities of the same in respect, particularly, to the various types of expenses, common thereto, and consistently required therefor, and incurred by the trustee, on account of requisite clerical work, legal services, office space, vault spaces and other sundry office items.

**STATE SUPREME COURT OPINION AND FINAL JUDGMENT INCLUDE SUBSTANTIAL DEPARTURES IN MATERIAL RESPECTS FROM THE ESTABLISHED MINNESOTA LAW WHICH FORMED THE OBLIGATIONS OF THE INVOLVED CONTRACTS AND SAID OPINION AND FINAL JUDGMENT IMPAIR THE OBLIGATIONS OF SAID CONTRACT AND VIOLATE SECTION 10 OF ARTICLE I OF THE FEDERAL CONSTITUTION.**

The opinion in sharp departure from the established law of Minnesota predicates its decision of waiver and forfeiture of all administration expenses incurred by the Trustee and otherwise deductible from gross income upon the erroneous and inaccurate factual basis that the Record established the fact that such expenses had neither been paid nor provided for prior to the distribution of income to the beneficiaries and prior to the accumulation and addition of income to principal. (Rec. Proc. St. Sup. Ct., pp. 161 to 183, incl., ff. 481 to 525, incl.)

The following excerpt states the law of Minnesota as the same existed from the inception of the Trust instruments here in question until the entry of the State's Supreme Court Opinion in this cause. "Forfeitures are regarded with increasing disfavor, and properly so, for the award of reasonable damages rather than the infliction of a penalty for the breach of a contract, is all that substantial justice requires. The law will indulge in no presumptions favorable to a forfeiture. Forfeitures should not be permitted upon uncertain

or doubtful inferences. Equity is inclined against a forfeiture." (Dunnell's Digest Section 3793.)

The Court's attention is directed to its decisions in re Estate of Overvold, 186 Minnesota 359, 367, where the Court enunciated the Minnesota law in respect to waiver as the same subsisted from the inception of the said trust instruments until the entry of the Opinion upon this Appeal; the Court there said:

"Where waiver operates merely to dispense with notice or other formal requirement in a matter or proceeding or to defeat a forfeiture, it is favored; but where the effect of a waiver is to deprive a party of a substantial property right without consideration, so that in effect it works a forfeiture, it is not favored. In such cases it should be necessary to show that the party claiming the waiver has been led to act thereon to his detriment. Orr v. Sutton, 127 Minn. 37, 58, 148 N. W. 1066, Ann. Cas. 1916C, 527.

"An intention to waive an existing legal or property right must be clearly shown. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861; Kubn v. Kabes, 142 Minn. 433, 172 N. W. 496; Clark v. Dye, 158 Minn. 217, 197 N. W. 209; Clark v. Cargill Elev. Co., 158 Minn. 429, 197 N. W. 845. Giving full effect to the facts disclosed and found, they do not sustain the conclusion that the appellants waived their rights to the proceeds of the homestead. What has been said in reference to waiver disposes also of any question of estoppel."

The record shows that the Trustee, in each instance, had made distribution of a portion of income and principal to the beneficiaries presumably in accordance with the applicable provisions of the trust instrument; that the Trustee in each instance, had made deductions from income merely in partial reimbursement of its administration expenses; that the Trustee quarterly issued statements to the beneficiaries, in each case, merely in respect to receipts and disbursements; that in no case had the Trustee issued any statement of accounts which purported to include all claim-

which the Trustee might have had for deduction from income on account of its administration expense; that the matter of final allocation of the considerable undistributed income, in each case representing approximately \$600,000, was intended to be dealt with in the future under the contemplated original comprehensive account of the Trustee; that the Trustee had made ample provision for the deduction of reimbursement on account of all its administration expenses which had not been reimbursed to the Trustee by deductions from income by the retention in the possession of the Trustee of the undistributed and unexpended portions of income aggregating as aforesaid, in each case, approximately \$600,000. The law of Minnesota as the same had been established by statute and judicial decision and remained operative from the inception of the subject Trust instruments until the entry of the Opinion on this Appeal, reserved to the Trustee, in each case, a lien on the income and corpus of the Trust Estate for the payment of the full amount of deductible administration expenses. The Minnesota Supreme Court enunciated the following rule in *re Truesdal v. Philadelphia Trust, Safe Deposit & Ins. Co.* (65 N. W. 133, 135) :

"And the general rule is that such expenses of properly administering a trust are a lien on behalf of the trustee of the estate in his hands, and he will not be compelled to part with his control of the estate until such expenses are paid."

The Mason's Minnesota Statutes 1927, Sec. 7737, provides, in part, as here applicable:

"Any trust company shall be entitled to reasonable compensation, or such amount as has been or may be agreed upon by the parties, and all necessary expenses, with legal interest thereon, unless otherwise agreed upon."

Manifestly it was inaccurate to have stated in the Opinion that no provision had been made for the payment of administration expenses, incurred by the Trustee, and not actually deducted, by the latter, from the income or corpus of the trust estates. See Statement of Gross Income Disbursements and Retentions of Same (Walter P. Butler Trust) set

forth on page 21 Appellant's Brief and based upon Rec. pp. 93 to 96 incl., ff. 279 to 289, incl. (Petitioner's Exhibit "D" Rec. p. 126, ff. 377, 378.)

The State Supreme Court Opinion quotes the following section of the subject trust instrument provisions which consists of but one sentence:

**"22 Offices, Clerks, Etc.**

"The Trustees are hereby empowered to employ such clerks and other persons and to do and perform such acts and things as they may deem requisite and for the proper and convenient execution of said trust, and all expenses, including the compensation of the Trustees, shall be paid or provided for prior to any distribution of income or principal to the beneficiaries in this instrument designated and prior to the accumulation and addition of income to the principal or body of the trust estate."

In purporting to deal with the construction of the foregoing quoted trust instrument provisions represented by said single sentence, particularly in respect to the character of administration expenses thereby authorized to be incurred and made deductible items of administration expense in favor of the Trustee, the Opinion contains a conclusion to the effect that ordinary clerical work and bookkeeping work are not within the language of the clause and the administration expense incurred for neither of the same would represent an item of administration expense reimbursable from the Trust Estates to the Trustee. The Opinion, in reaching such conclusion, substitutes for the plain and unambiguous language contained in subject provisions, general principles applicable to trust administration having meanings consistently at variance with the clear meaning of the language of the subject provision. The Opinion, in this regard, represents a sharp departure from the established law of Minnesota which formed the obligations of the subject contracts. The attention of the Court is direct to the cardinal rules of construction expressive of the laws of Minnesota forming a part of such contracts both at the time when such contracts were

made and constantly thereafter until the entry of said Supreme Court Opinion and Final Judgment, in this cause. Such Cardinal rules as enunciated in N. W. Natl. Bk. & Trust Co. v. Pirich 9 N. W. 2nd 773, 777, is the following:

"It is not for the court to read into a trust instrument provisions which do not expressly appear or which do not arise by implication from the plain meaning of the words used (citing cases), and the court will not substitute its discretion for that of the trustee except when necessary to prevent an abuse of discretion. Dumaine v. Dumaine, 301 Mass. 214, 222, 16 N. E. 2nd 625, 629, 118 ALR 834, 841. (In Re. McCann's Will, 2 N. W. 2nd 226, 230)"

"The cardinal rule of construction to which all others must yield is that the intention of the testator as expressed in the language used in the will shall prevail if it not inconsistent with the rules of law."

The inclusion in a trust instrument comparable to each trust instrument here involved of provisions empowering the Trustee to employ clerks and other persons in the performance of clerical work necessary to the administration of the Trust Estate and to deduct the amount of all expenses to be incurred, from income, would not contravene any law or any matter of public policy. The Opinion, in respect to the basis for the construction placed upon the subject trust instrument provisions thereby gives no apparent consideration to the uncontrovertible fact, appearing in the Record, that both Trustor and Trustee, acting in concert, construed such trust instrument provisions as empowering the Trustee to employ clerks and other persons in the performance of ordinary clerical work requisite to the administration of each Trust Estate and to deduct full reimbursement on account of all expense thus incurred, by the Trustee, from gross income. This construction of the subject trust instrument provisions was exemplified by Petitioner's Exhibit "E" the resolution and transcript of the Minutes of the Meeting of the Board of the Directors of Builders Trust Company held July 21, 1927, and by Petitioner's Exhibits "G" and H 1 and 2.

(Rec. pp. 97, 98, ff. 289 to 296, Incl. (Petitioner's exhibit "E" Rec. pp. 127, 128, ff. 379 to 384, Incl.) (Rec. pp. 100, 101, 102, ff. 299 to 306, Incl.) (Petitioner's Exhibit "G" & "H" Rec. pp. 151 to 158, Incl., ff. 451 to 474, Incl.) Rec. 110, 111, ff. 330 to 333, Incl.")

In Muhlker v. New York & H. R. Co., 49 L. Ed. 872, 878, the Court said:

"The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

See also Home Building & Loan Asso. v. Blaisdell, 78 L. Ed. 413, 423; W. B. Worthen Co. v. Kavanaugh, 79 L. Ed. 1298, 1301, 1302; James B. Walker v. William H. Whitehead, 21 L. Ed. 793, 799; Edwards v. Kearzey, 24 L. Ed. 793, 799; Union Bank v. Board of Com'rs. 90 Fed. 7, 9, 10; Douglas v. Pike County, 25 L. Ed. 968, 971, 972; McCann's Will (3 N. W. 2nd 226, 230.)

**STATE SUPREME COURT FINAL JUDGMENT AD-  
JUDGES DISALLOWANCE OF ADMINISTRATION  
EXPENSES INCURRED BY PETITIONER AS TRUS-  
TEE OF SUBJECT TRUST ON ACCOUNT OF CLER-  
ICAL WORK AND OTHER SERVICES NECESSARY  
AND DIRECTED TO THE ADMINISTRATION OF  
THE SUBJECT TRUST ESTATES AND THE EXECU-  
TION OF THE SUBJECT TRUSTS, BY PETITIONER  
AS TRUSTEE OF THE SAME WITHOUT EVIDENCE,  
CONTRARY TO THE EVIDENCE ADDUCED IN DE-  
NIAL OF PETITIONER'S FEDERAL CONSTITU-  
TIONAL RIGHTS UNDER SECTION 1 OF AMEND-  
MENT XIV TO THE FEDERAL CONSTITUTION.**

The Opinion and final judgment of said State Supreme Court, in this cause, determine and deny every right, title, claim and immunity, specially set up and asserted by the Petitioner, under said Petition for Rehearing and predicated upon the Federal Constitutional rights secured to Petitioner under said Section 1 of Amendment XIV of the Federal Constitution and unduly deprive Petitioner of its liberty and freedom of contract and substantial property represented by its involved aforesaid claims for reimbursement from the Trust Estates on account of its incurred administration expenses, without due process of law, and without there having been afforded to Petitioner any real opportunity to establish, protect, or enforce any such claim, and in denial and deprivation of petitioner's rights, privileges, and immunities, in such regard, secured to Petitioner in and by said Section 1, of Amendment XIV to the Federal Constitution; all as more particularly appears from said Petition for Rehearing, such Petition for Rehearing, by reference, being hereby incorporated herein as part hereof with the same intent, purpose and effect as if said Petition for Rehearing were set

forth herein word for word.

In *Saunders v. Shaw*, 61 L. Ed. 1163, 1165, the Court said:

"The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done. Judgment reversed."

In *Binkerhoff-Faris Trust & Sav. Co. v. Hill*, 74 L. Ed. 1107, 1114, the Court said:

"But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare *Postal Teleg. Cable Co. v. Newpert*, 247 U. S. 464, 475 476, 62 L. ed. 1215, 1220, 1221, 38 Sup. Ct.

In *Postal Tel. Cable Co. v. Newpert*, 62 L. Ed. 1215, 1221, the Court said:

"The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Windsor v. McVeigh*, 93 U. S. 274, 277, 23 L. ed. 914, 915; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. And as a state may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceeding without a hearing or an opportunity

to be heard (Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; Scott v. McNeal, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 59 L. ed 1027, 1031, 35 Sup. Ct. Rep. 625), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor a privy with a party therein."

The Petitioner respectfully submits that the Petition herein for a Writ of Certiorari to review the final Judgment of the Supreme Court of the State of Minnesota, involving fundamental federal constitutional questions, especially set up and claimed by said Petitioner, should be granted by this Honorable Court.

Respectfully submitted

**BUILDERS TRUST COMPANY,  
A Minnesota Corporation,  
Petitioner.**

**LOUIS P. SHEAHAN,**

**SAMUEL LIPSCHULTZ,**

1300 Minnesota Building,  
Saint Paul, Minnesota,  
Attorneys for Petitioner.